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IN THE

Supreme Court of the United States

SAMSUNG ELECTRONICS CO., LTD., ET AL.,

Petitioners,

v.

APPLE INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE 113 DISTINGUISHED INDUSTRIAL DESIGN PROFESSIONALS AND EDUCATORS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 35 U.S.C. § 289, which provides that a party that infringes a design patent may be held "liable ... to the extent of his total profit," permits a jury to award the patent owner all profits the infringer earns from copying the patented design.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. History Shows That A Product's Visual Design Drives Sales And Becomes The Product Itself In The Minds Of Consumers. 7

A. The founders of industrial design discovered that design drives sales of consumer products. 7

B. History teaches that a product's visual design becomes the product itself in the minds of consumers. 10

II. Design Is Particularly Important For Consumer Products With Complex Technology. 16

A. Successful technology companies use design to differentiate themselves from competitors. 16

B. Cognitive science explains why design is particularly important for consumer products with complex technology 17

III. Section 289 Requires Disgorgement Of An Infringer's Total Profits On The Infringing Article Of Manufacture. 24

A. Section 289 requires disgorgement of "total profits" because it is the infringing design that sells the product and makes it possible to realize profits..... 24

B. Given the jury's infringement finding, Samsung must disgorge its total profits..... 26

C. Samsung's arguments to the contrary rest on a fundamental misunderstanding of design patents. 30

D. This Court should decline to adopt the "totality of the circumstances" test for identifying an article of manufacture. 34

CONCLUSION 36

APPENDIX A

List of Signatories 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Ethicon Endo-Surgery, Inc. v. Covidien, Inc., 796 F.3d 1312 (Fed. Cir. 2015) 25, 31

Gorham Co. v. White, 81 U.S. 511 (1871) 6, 25

K-TEC, Inc. v. Vita-Mix Corp., 696 F.3d 1364 (Fed. Cir. 2012) 24

Statutes & Legislative Materials

35 U.S.C. § 171 ..... 3, 24

35 U.S.C. § 289 ..... i, 3, 6, 25, 30, 32, 34

Act of Aug. 1, 1946, Ch. 726, 60 Stat. 778 32

H.R. Rep. No. 1966 (1886), *reprinted in* 18 Cong. Rec. 834 (1887) 3, 24

Other Authorities

3M Names Eric Quint Chief Design Officer, 3M.com (Apr. 11, 2013), http://tinyurl.com/jnxdp9q 16

Christine Birkner, *Packaging "Smaller is Bigger,"* Adweek Magazine, June 6, 2016 13

Peter H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, J. of Marketing, July 1995 19

Daniela Büchler, *How Different Is Different? Visual Perception of the Designed Object* (2011) 21

David Butler & Linda Tischler, *Design to Grow: How Coca-Cola Learned to Combine Scale and Agility (and How You Can Too)* (2015) 10, 11, 16, 35

CACM Staff, *Visualizations Make Big Data Meaningful*, Communications of the ACM, June 2014, http://tinyurl.com/z7lulrn 16

Del Coates, *Watches Tell More than Time: Product Design, Information, and the Quest for Elegance* (2003) 21

Nathan Crilly et al., *Seeing Things: Consumer Response to the Visual Domain in Product Design*, 25 Design Stud. 547 (2004) 21, 22, 27

Norman L. Dean, *The Man Behind the Bottle* (2010) 12, 13

James T. Enns, *The Thinking Eye, The Seeing Brain* (2004) 28

David Gartman, *Auto-Opium: A Social History of American Automobile Design* (Routledge 1994) 14, 15

Siegfried Giedion, *Mechanization Takes Command: A Contribution To Anonymous History* (1948) 8

Lev Grossman, *The Apple of Your Ear*, Time, Jan. 12 2007.....26, 27

Gerald C. Kane & Alexandra Pear, *The Rise of Visual Content Online*, MIT Sloan Mgmt. Rev. (Jan. 4, 2016), http://tinyurl.com/jns258w 17

David J. Kappos, *America Doesn't Do Enough to Protect Its Innovative Designs*, Wired (Nov. 9, 2015), http://tinyurl.com/q5nqspk. 32, 33

Barry M. Katz, *Make It New: A History of Silicon Valley Design* (2015).....26

Kyong-Ae-Choi, *Q&A: Hyundai Design Chief*, The Wall Street Journal (Mar. 5, 2013), http://tinyurl.com/hh37mc5.....16

Michael Lamm & Dave Holls, *A Century of Automotive Style: 100 Years of American Car Design* (1996) 13, 4, 35

Raymond Loewy, Industrial Design: Yesterday, To-day and Tomorrow? Address Before the Meeting of the Society and the Faculty of Royal Designers for Industry (Oct. 9, 1980) in J. of the Royal Society of Arts, Mar. 1981, *available at* http://tinyurl.com/k82286s.....9

Raymond Loewy, *Jukebox on Wheels*, The Atlantic, Apr. 1955, http://tinyurl.com/jmda7jp 13

Bob Lutz, *Go Lutz Yourself: There Are No Bad Cars, Only Bad Designs*, Road & Track (Aug. 13, 2015), http://tinyurl.com/zgbqz9h 35

Modern Living: Up from the Egg, Time, Oct. 31, 1949 ..... 8, 9

Ruth Mugge & Jan P.L. Schoormans, *Making Functional Inferences Based on Product Design: The Effects of Design Newness*, in Proceedings of the Society for Consumer Psychology (Feb. 24-27, 2011) 19

David Charles Musker, *Industrial Design Rights: United Kingdom, in* Industrial Design Rights: An International Perspective (Brian W. Gray & Rita Gao eds., 2d ed. 2016) 33

Alexandra Neri, *Industrial Design Rights: France, in* Industrial Design Rights: An International Perspective (Brian W. Gray & Rita Gao eds., 2d ed. 2016) 33

Donald A. Norman, *Emotional Design: Why We Love (or Hate) Everyday Things* (2004) 19

Stephen E. Palmer, *Vision Science, Photons to Phenomenology* (1999) 18

Luigi Pavenello, *Industrial Design Rights: Italy in* Industrial Design Rights: An International Perspective (Brian W. Gray & Rita Gao eds., 2d ed. 2016) 33

Antoaneta P. Petkova & Violina P. Rindova, *When Is a New Thing a Good Thing? Technological Change, Product Form Design, and Perceptions of Value for Product Innovations*, 2006 Design Research Soc'y, Int'l Conference in Lisbon (IADE), Paper 0311, *available at* http://tinyurl.com/gmgukzp 19

Gratiana Pol et al., *Blinding Beauty: When and How Product Attractiveness Overpowers Negative Information,* Proceedings of the Society for Consumer Psychology (Feb. 24-27, 2011) 20

Arthur J. Pulos, *American Design Ethic: A History of Industrial Design to 1940* (1983).....7, 8, 9, 14, 32

Jeneanne Rae, *What Is the Real Value of Design?* 24 Design Mgmt. Rev., Winter 2013.....17

Ted Ryan, *The Story of the Coca-Cola Bottle*, Feb. 26, 2015, http://tinyurl.com/jmbbg6u 10, 12

Bernd Schmitt & Alex Simonson, *Marketing Aesthetics: The Strategic Management of Brands, Identity, & Image* (1997) 17, 18, 19, 23

Shaun Smith & Joe Wheeler, *Managing the Customer Experience: Turning Customers into Advocates* (spec. ed., Pearson Custom Publ'g, 2002) 20, 22

Michelle Stuhl, *What Is Behind the Rise of the Chief Design Officer?* Forbes (Nov. 11, 2014), http://tinyurl.com/h3v354k 16

H. Tarantous, *Big Improvement in Comfort of 1925 Cars*, N.Y. Times, Jan. 4, 1925 15

Alex Taylor III, *GM vs. Ford: The hundred-year war*, Fortune (Mar. 23, 2011), http://tinyurl.com/jar6njb 14

Claudia Townsend & Sonjay Sood, *The Inherent Primacy of Aesthetic Attribute Processing, in* The Psychology of Design 208 (Rajeev Batra et al. eds., 2016) 18, 19, 22

Fred Vogelstein, *Dogfight: How Apple and Google Went to War and Started a Revolution* (2013) 27

Rob Walker, *The Guts of a New Machine*, N.Y. Times, Nov. 30, 2003 27

INTEREST OF AMICI CURIAE[1]

Industrial Design (ID) is the professional service of creating products and systems that optimize function, value, and appearance for the mutual benefit of user and manufacturer. Amici curiae are leading industrial design professionals, fashion designers, design museum directors, design research professionals and design academics who work in high-profile consulting firms, prominent academic institutions and leading high-technology corporations across the United States and Europe. We have decades of experience providing product design services to leading U.S. and international corporations, nonprofit organizations, and government entities including Apple, Samsung, American Airlines, AT&T, Calvin Klein, Citibank, Coca-Cola, Ford, General Electric, General Motors, Goldman Sachs, The Harvard Endowment, Herman Miller, Hewlett Packard, Google, IBM, Knoll, Lenovo, LG, Louis Vuitton, Mobil Oil, Motorola, the New York Stock Exchange, NASA, Nike, Pfizer, Polaroid, Procter & Gamble, Starbucks, Target, Whirlpool, and Xerox and many. many others.

Amici have served as President and Chairman of the Board of the Industrial Designers Society of America. We have lectured at leading graduate pro-

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[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel has made any monetary contribution to the preparation or submission of this brief.

grams, including, Harvard, MIT Sloan School of Management, Stanford University, Parsons School of Design, Pratt Institute of Design, Rhode Island School of Design, Innovation Design Lab of Samsung, Art Center College of Design and the University of Pennsylvania. Collectively, we have written and contributed to hundreds of leading business, academic and news publications, including Business Week, The New York Times, Innovations Magazine, Science and The Wall Street Journal.

We have been invited speakers at leading law conferences on design patents. We have been either consulting or testifying experts in hundreds of design patent cases including those which have formed the basis for modern design patent law. We have testified before Congress about intellectual property and design patents. We have been instrumental in the planning of and have spoken at the Patent Office's "Design Day" since its inception.

We have received hundreds of major design awards for our work in industrial design, design research and design education. We have served on hundreds of design competitions in the U.S. and abroad. Our product design solutions are on display at leading design museums in the U.S. and abroad including the Museum of Modern Art. Our design solutions have fundamentally contributed to the economic growth of the U.S. and world economy.

We all share a strong professional interest in seeing that design patent law continues to protect investments in product design. Congress has provided that "[w]hoever invents any new, original and ornamental

design for an article of manufacture may obtain a patent therefor." 35 U.S.C. § 171 (a). And one who infringes a design patent "shall be liable to the owner to the extent of his total profit." 35 U.S.C. § 289. We have based our professional lives on the assumption that designs are patentable and worth enforcing when infringed. Collectively, we are named inventor on hundreds of U.S. design and utility patents.

Amici have no personal interest in the outcome of this dispute between Apple Inc. and Samsung Electronics.[2] We have consulted for both parties. Both of these leading technology companies own numerous design patents. This case happens to involve three of Apple's design patents. But Samsung also owns design patents on various sophisticated and complex technological products. *See, e.g.*, U.S. Design Patent No. 658,612 (ornamental design for a television set). The fundamental principles of visual design set forth below are agnostic as to who brings forth a new design to the world.

SUMMARY OF THE ARGUMENT

Congress determined in 1887 that "it is the design that sells the article, and so that makes it possible to realize any profit at all." H.R. Rep. No. 1966 (1886), *reprinted in* 18 Cong. Rec. 834 (1887). History and science have proven that judgment correct.

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[2] We cite Samsung's Opening Brief as Samsung Br., the Brief for the United States as U.S. Br., and the Joint Appendix below as C.A.

I. The history of industrial design and the experience of America's most profitable industries demonstrate the value of design. The founders of American industrial design discovered that design drives sales of consumer and commercial products. Indeed, a product's visual design *becomes* the product itself in the minds of consumers. Modern cognitive and marketing science verifies this fact. Two examples prove the point. First, the distinctive Coca-Cola bottle, which was designed and patented in 1915, helped the soft drink become the most widely distributed product on earth. A 1949 study showed that more than 99% of Americans could identify a bottle of Coke by shape alone, and customers routinely report that Coke tastes better when consumed from the patented bottle. The same is true for American automobiles. Henry Ford's original Model T was notoriously unattractive. After General Motors created an Art & Colours department in the 1920s, GM permanently surpassed Ford in annual sales. Embracing industrial design eventually lead to huge U.S. economic growth, as car manufacturers discovered that without changing the underlying technology, engineering or functionality, they could create many different makes and models simply by changing the automobile's shape, style and appearance. Today, design outranks all other considerations and is the driving force behind new car purchases.

II. Design is particularly important for consumer products with complex technology. Cognitive science proves that a product's visual design has powerful effects on the human mind and decision making processes, and eventually comes to signify to the consumer the underlying function, origin, and overall

user experience of that product. Sight is overwhelmingly our strongest sense. In addition, the human brain recalls memories and emotions attached to visual stimuli for far longer than text or words. Because the brain does not separate the physical appearance of an object from its functions, a consumer's subsequent exposure, experience, or knowledge of a product are cognitively mapped onto the product's visual design such that the look of the product comes to represent the underlying features, functions, and total user experience.

This is especially true in the market for complex technological products. Counterintuitively, when a single product performs numerous complex functions, and when parity in functionality is assumed across manufacturers, product design becomes more important, not less. By stealing designs, manufacturers steal not only the visual design of the product, but the underlying functional attributes attached to the design of the product, the mental model that the consumer has constructed to understand the product, and the brand itself and all associated attributes developed at great expense in the marketplace.

III. Design patents thus protect from misappropriation not only the overall visual design of the product, but the underlying attributes attached to the design of the product in the eye and mind of the consumer. When an infringer steals the design of a successful product, it captures the consumer's understanding of what the product does and what the product means in addition to the emotional connections associated with the company's brand. The plain

text reading of 35 U.S.C. § 289, requiring disgorgement of total profits, thus remains sound and perfectly aligned with modern cognitive science. Indeed, disgorgement of total profits is the only appropriate remedy for design patent infringement.

Ignoring the statute's clear text, Samsung argues that total profits cannot really mean total profits, because "[u]nder [this] rule, an infringer of a patented cupholder design must pay its entire profits on a car, an infringer of a patented marine-windshield design must pay its entire profits on a boat, an infringer of a patented, preinstalled musical-note icon design must pay its entire profits on a computer, and so on." Samsung Br. 1; *see also* U.S. Br. 23. But Samsung is profoundly confused about the design patent system. The test for design patent infringement requires the possibility of a captured sale. *See Gorham Co. v. White*, 81 U.S. 511, 528 (1871). Under this test, one who patents a design for a cupholder could never recover profits on an entire car because no one could be induced into purchasing a Jeep supposing it to be a Porsche simply because the vehicle's cupholders looked the same.

The jury was instructed as much in this case—that it could only find that Samsung's phones infringed Apple's design patents "if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, the resemblance between the two designs is such as to deceive such an observer, inducing him to purchase one supposing it to be the other." The undersigned take no position on whether the jury's finding on that point was correct, but Samsung does not challenge it before this Court. Thus, the jury

properly awarded to Apple all of Samsung's profits from selling its copycat devices.

ARGUMENT

I. History Shows That A Product's Visual Design Drives Sales And Becomes The Product Itself In The Minds Of Consumers.

A. The founders of industrial design discovered that design drives sales of consumer products.

Americans' first inventions were born of necessity, directed towards function rather than aesthetics, as the "implements brought from Europe ... proved less than adequate in the American wilderness." Arthur J. Pulos, *American Design Ethic: A History of Industrial Design to 1940* 5 (1983). Critics praised America's "technological wonders," but found them lacking in appearance—"severe and even tasteless, with little or no ornamental value." *Id.* at 110, 116. That suited the American public at the time, which "was not concerned with such lofty notions as the relationship of function to form or the inherent aesthetic of manufactured objects—it was simply overwhelmed by the flood of affordable machine-made products that promised to improve material existence." *Id.* at 161.

By the early 20th century, the United States had surpassed all other countries in the sale of manufactured goods, but "an undercurrent of dissatisfaction and even embarrassment was emerging about the

lack of genuine aesthetic quality in American manufactures." *Id.* at 242. At the same time, with the advent of mass-produced print advertising, it "quickly became apparent that the appearance of the product in an advertisement would be an important element in its public acceptability." *Id.* at 279.

Thus, American manufacturers began to recognize "that appearance does count," and industrial designers became integral to shaping mass-produced consumer products. Siegfried Giedion, *Mechanization Takes Command: A Contribution To Anonymous History* 608-10 (1948). Raymond Loewy, who would become the father of American industrial design, first worked on a redesign of Sigmund Gestetner's "famed old duplicating machine." *Modern Living: Up from the Egg*, Time, Oct. 31, 1949. Here is an image of the original machine:

In just five days, Loewy transformed it from a set of exposed and chaotic-looking metals and gears sitting on top of four protruding tubes into a streamlined and aesthetically appealing device. Here is a picture of Loewy's design:

After Loewy's re-design, sales soared so high that Gestetner was required to build three additional factories to meet the increased demand, and the company kept the same model for 30 years. Raymond Loewy, Industrial Design: Yesterday. To-day and To-morrow? Address Before the Meeting of the Society and the Faculty of Royal Designers for Industry (Oct. 9, 1980) in J. of the Royal Society of Arts, Mar. 1981, at 200, 203, *available at* http://tinyurl.com/k82286s.

Loewy later performed the same task for Sears, Roebuck & Co.'s Coldspot refrigerator, turning "an ugly machine with a dust trap under its spindly legs" into a "gleaming unit of functional simplicity." *Modern Living*, *supra*; *see* U.S. Design Patent No. 112,080 (Nov. 8, 1938). Sales increased "from 15,000 to 275,000 units within five years." Pulos, *supra*, at 358.

By 1949, American businesses were spending nearly half a billion dollars annually on industrial design. *Modern Living*, *supra*. The work of Loewy and his contemporaries proved, in concrete numbers, that "although the consumer might not always understand the mechanism or construction of a manufactured product ... he could always depend upon what his senses told him about it." Pulos, *supra*, at 133.

B. History teaches that a product's visual design becomes the product itself in the minds of consumers.

Visual design does not only drive sales. The history of industrial design and the experience of America's most profitable industries demonstrate that a product's visual design becomes the product itself in the mind of consumers. It is the design of a successful product that embodies the consumer's understanding of and desire to own and interact with it. Two examples prove the point.

1. *Coca-Cola*

After the Civil War, John Pemberton launched the Pemberton Chemical Company with entrepreneurial dreams and a secret formula for a new beverage: cola-flavored syrup mixed with soda water. David Butler & Linda Tischler, *Design to Grow: How Coca-Cola Learned to Combine Scale and Agility (and How You Can Too)* 36-37 (2015). Pemberton's accountant, a fan of alliteration, suggested the name "Coca-Cola." *Id.* at 37. The drink was originally sold only from soda fountains. In 1899, two Chattanooga lawyers contracted with Coca-Cola to bottle the drink to be consumed on the go. Ted Ryan, *The Story of the Coca-Cola Bottle*, Feb. 26, 2015, http://tinyurl.com/jmbbg6u.

Within just a few years, there were hundreds of independent bottlers, and, unfortunately, legions of imitators. Butler, *supra*, at 38. The banality of Coca-

Cola's bottles—simple, straight-sided glass containers with an embossed name or a paper label—made them easy to duplicate. *Id.* at 54.

In 1915, the Trustees of the Coca-Cola Bottling Association commenced a national contest for the design of a unique new bottle. *Id.* They sought a bottle that "a person can recognize as a Coca-Cola bottle when he feels it in the dark ... so shaped that, even if broken, a person could tell at a glance what it was." *Id.* at 53-54. Two employees of the Root Glass Company of Terre Haute, Indiana—Earl R. Dean and Alexander Samuelson—drew inspiration from the shape of a cocoa pod to design the winning bottle. *Id.* at 54; *see* U.S. Design Patent No. 48,160 (Nov. 16, 1915).

The distinctive bottle, with its contoured shape and the words "Coca-Cola" scrawled in cursive, put a stop to imitators and was "the catalyst that [helped] Coca-Cola become the most widely distributed product on earth." Norman L. Dean, *The Man Behind the Bottle* 106 (2010). A 1949 study showed that more than 99% of Americans could identify a bottle of Coke by shape alone. Ryan, *supra*. The impact of the contour bottle's design on the company's profits—and American culture—is difficult to overstate. According to Coca-Cola, "[n]o one can even guess where the Coca-Cola business might be today if it were not for the unique package that distinguishes the product ... around the world." Dean, *supra*, at 14. The iconic shape of the bottle is so important as a brand signifier that today it is reproduced in silhouette form on aluminum cans of Coke:

Christine Birkner, *Packaging "Smaller is Bigger,"* Adweek Magazine, June 6, 2016 at 12.

But the contour bottle represents more than just marketing for the brand—it has become synonymous with the beverage itself. Customers routinely report that Coca-Cola tastes better when consumed from the contour bottle, though there is no difference in the formula. Dean, *supra* at 108. In the words of Coca-Cola's Executive Vice President: "Nothing instantly communicates the essence of Coca-Cola throughout the world like our contour bottle." *Id.* at 16.

2. *American Automobiles*

"The American automobile ... changed the habits of every member of modern society. [It is] the symbol, all over the world, of American industrial genius and enterprise." Raymond Loewy, *Jukebox on Wheels*, The Atlantic, Apr. 1955, http://tinyurl.com/jmda7jp. Initially, though, American cars were simply horseless, motorized carriages that "didn't look right" without the horses. Michael Lamm & Dave Holls, *A Century of Automotive Style: 100 Years of American Car De-*

sign 13 (1996). Public descriptions of early automobiles ranged from "generally untidy" to "positively ugly," David Gartman, *Auto-Opium: A Social History of American Automobile Design* 23, 26 (Routledge 1994), and from 1900 to 1925, car makers singularly focused "on making cars reliable, durable, useful, and comfortable," Lamm, *supra*, at 24. Consumers' interests initially aligned with this focus, and, "[f]or a while, that the automobile worked at all and could be operated with reasonable reliability was sufficient." Pulos, *supra*, at 242.

Henry Ford's Model T was the perfect example: It was notoriously unattractive, yet it sold more than 15 million units. *Id.* at 256. In 1926, however, General Motors introduced a bold and colorful Chevrolet that quickly surpassed sales of the black Model T. Gartman, *supra*, at 77. General Motors president Alfred P. Sloan understood just "how much appearance and style contributed to the sale of new automobiles," and in 1927. he developed "a plan to establish a special department to study the question of art and color combinations in General Motors products." Lamm, *supra*, at 84, 89. Sloan hired designer Harley J. Earl to lead the newly minted Art & Colours department, which would become "the most important, influential automotive styling section the world has ever known." *Id.* at 84; *see, e.g.*, U.S. Design Patent No 93,764 (Nov. 6, 1934) (design for an automobile or similar article); U.S. Design Patent No 95,495 (May 7, 1935) (design for automobile). It would also lead General Motors to permanently surpass Ford in annual sales. *See* Alex Taylor III, *GM vs. Ford: The hundred-year war*, Fortune (Mar. 23, 2011), http://tinyurl.com/jar6njb.

Embracing industrial design led not only to more beautiful automobiles, but to huge U.S. economic growth. Without changing the underlying technology, engineering or functionality, car manufacturers discovered that they could create many different makes and models simply by changing the automobile's shape, style and appearance. For example, General Motors maintained five separate brands—Chevrolet, Pontiac, Oldsmobile, Buick, and Cadillac—whose models shared not only mechanical parts, like transmissions and brakes, but also body shells, the structural foundations of the car's body. Gartman, *supra*, at 74. Dozens of different GM models were built on the same three body shells. Yet each model looked unique due to the addition of aesthetic features like fenders, headlights, taillights, and trim. *Id.* at 97. And GM produced each model in a dazzling variety of colors. It also introduced the annual model change, tweaking the body style of all cars each year. *Id.* at 75-76. Sales of these different models to "people ever thirsty for something new" soared. H. Tarantous, *Big Improvement in Comfort of 1925 Cars*, N.Y Times, Jan. 4, 1925 at A2.

* * *

Whether the relevant article of manufacture is an iconic soda bottle or an automobile, history teaches that visual design is *the* way to package, market and sell technological innovation, manufacturing knowhow, product reliability and performance expectations. Appearance becomes identified with the underlying functional features and with a particular level of product quality and safety.

II. Design Is Particularly Important For Consumer Products With Complex Technology.

A. Successful technology companies use design to differentiate themselves from competitors.

The importance of visual design is reflected in the complex technological products that have become ubiquitous in modern society For American companies, "[a]s the stakes get higher, and the world gets more complex, using design to learn and adapt is ... critical." Butler, *supra*, at 104. Thus, today "companies are elevating design and expanding its role throughout the business." Michelle Stuhl, *What Is Behind the Rise of the Chief Design Officer?* Forbes (Nov. 11, 2014), http://tinyurl.com/h3v354k. Indeed, "design is being baked into every aspect of corporate life." *Id.*

There are over 40,000 industrial designers in the United States, and "many Silicon Valley startups have three co-founders: a technologist, a business person, and an artist [designer]." CACM Staff, *Visualizations Make Big Data Meaningful*, Communications of the ACM, June 2014 at 21, http://tinyurl.com/z7lulrn. Similarly, many well-known corporations, including 3M, Audi, Hyundai, Johnson & Johnson, Pepsi Co., Philips Electronics and Volkswagen, count Chief Design Officers among their corporate executives. *See* Stuhl, *supra*; Kyong-Ae-Choi, *Q&A: Hyundai Design Chief*, The Wall Street Journal (Mar. 5, 2013), http://tinyurl.com/hh37mc5; 3M Names Eric Quint

Chief Design Officer, 3M.com (Apr. 11, 2013), http://tinyurl.com/jnxdp9q.

These companies understand that "giving design a seat at the table adds significant value that helps differentiate and elevate [them] beyond the norm and helps to deliver tangible business results." Jeneanne Rae, *What Is the Real Value of Design?* 24 Design Mgmt. Rev., Winter 2013, at 30, 37. The world's most successful companies view design as a key corporate asset that undergirds their brand and differentiates them from competitors. *Id.* In fact, America's top fifteen "design conscious companies" outperform their peer group by 228% on a market asset value basis. *Id.* at 33. Design is thus a proven catalyst for American business and economic growth.

B. Cognitive science explains why design is particularly important for consumer products with complex technology.

Cognitive and marketing science explain why visual design is so critical to complex technology. Visual design acts as a powerful motivator of consumers' choices, and Aristotle's maxim that "all perception starts with the eye" is especially true with today's consumer products. Bernd Schmitt & Alex Simonson, *Marketing Aesthetics: The Strategic Management of Brands, Identity, & Image* 85 (1997).

"Sight is our strongest sense: 90% of information transmitted to the brain is visual, and 40% of nerve fibers to the brain are connected to the retina." Gerald C. Kane & Alexandra Pear, *The Rise of Visual Content*

Online, MIT Sloan Mgmt. Rev. (Jan. 4, 2016), http://tinyurl.com/jns258w. Once a product's image is received on the retina, the mind rapidly processes the image until it reaches what researchers label the "category-based" stage, where consumers—through visual image alone—"recover[] the functional, properties of objects: what they afford the organism, given its current beliefs, desires, goals and motives." Stephen E. Palmer, *Vision Science, Photons to Phenomenology* 91-92 (1999).

Visual designs "are processed more quickly than words and the connection between an image and its meaning is more direct than the connection between a word and its meaning." Claudia Townsend & Sonjay Sood, *The Inherent Primacy of Aesthetic Attribute Processing, in* The Psychology of Design 208 (Rajeev Batra et al. eds., 2016). While verbal or textual information regarding functionality must be processed sequentially, cognitive processing of visual design occurs "all at once" and "can be so quick that we may not be aware of its effects." *Id.* at 208, 209. In other words, while visual design is processed holistically and instantly, functions are processed sequentially, based on textural and spatiotemporal interactions with the product. "[B]ecause design is presented visually and because its visual presentation does not require any interpretation, it is processed more quickly and less deliberately than other attributes." *Id.* at 214.

In addition, the human brain recalls memories and emotions attached to visual stimuli (pictures, shapes, colors, products, etc.) for far longer than those attached to text or words. Schmitt, *supra*, at 86-87

This is the reason we can identify a product we have used before based on its visual appearance alone, but may not remember information we read about the product (such as technical specifications or instructions about product use). The powerful effect of visual design, which has been attributed to the mind's "higher degree of discrimination of pictures compared with words," is simply stronger and longer lasting than information gleaned from text. *Id.* at 86.

Immediately upon seeing a product, the mind forms "beliefs about product attributes and performance." Peter H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, J. of Marketing, July 1995, at 16, 20. Research has demonstrated that "attractive products are perceived to be of higher quality and easier to use." Ruth Mugge & Jan P.L. Schoormans, *Making Functional Inferences Based on Product Design: The Effects of Design Newness*, Proceedings of the Society for Consumer Psychology 188 (Feb. 24-27, 2011). (internal citation omitted). Unsurprisingly, "attractive things make people feel good." Donald A. Norman, *Emotional Design: Why We Love (or Hate) Everyday Things* 19 (2004). In scientific terms, cognitive processing of images has "been found to be associated with increased affect," as "high aesthetics activates the reward center of the brain." Townsend & Sood, *supra*, at 208. "[C]ustomers experiencing positive emotions may feel more predisposed to try new things and may perceive them as having higher value...." Antoaneta P. Petkova & Violina P. Rindova, *When Is a New Thing a Good Thing? Technological Change, Product Form Design, and Perceptions of Value for Product Innovations*, 2006 Design

Research Soc'y, Int'l Conference in Lisbon (IADE), Paper 0311, *available at* http://tinyurl.com/gmgukzp. Thus, emotional responses and connections to products and brands are "among the biggest drivers of repeat business." Shaun Smith & Joe Wheeler, *Managing the Customer Experience: Turning Customers into Advocates* 56 (spec. ed., Pearson Custom Publ'g, 2002).

Visual design can even overcome consumers' negative perception of function. Consumer psychology has shown that, "a beautiful product ... can completely overpower negative functionality information." Gratiana Pol et al., *Blinding Beauty: When and How Product Attractiveness Overpowers Negative Information,* Proceedings of the Society for Consumer Psychology 186-87 (Feb. 24-27, 2011). Thus, when researchers presented subjects with reviews depicting a computer as poor in functionality, but then later showed an image of a very attractive computer, the subjects' evaluations of the computer were just as favorable as those of subjects who had been shown favorable functionality reviews. *Id.* Visual attractiveness can even exceed what is known about the product, "generating particularly rich and favorable inferences about missing product attributes." *Id.* at 186.

Particularly important here, because the human information processing system does not separate the physical appearance of an object from the related functions of that object, a consumer's subsequent exposure, experience, or knowledge of a product are cognitively mapped onto the product's visual design such that the look of the product comes to represent the

features, functions, and total user experience of the product itself. A consumer's visual perception of an object is thus "constructed by the knowledge [the consumer] has of [that object]." Daniela Büchler, *How Different Is Different? Visual Perception of the Designed Object* 84-85 (2011).

Thus, when a consumer encounters a known product (or an infringing copy), the consumer identifies the look of the product with the underlying functional features. Design "subsumes all the other factors." Del Coates, *Watches Tell More than Time: Product Design, Information, and the Quest for Elegance* 15 (2003); *see also* Nathan Crilly et al., *Seeing Things: Consumer Response to the Visual Domain in Product Design*, 25 Design Stud. 547, 547 (2004) ("Judgments are often made on the elegance, functionality and social significance of products based largely on visual information.").

For a product that a consumer does not yet own, it is the visual design, rather than text or lists of features, that dominates print, television, and online advertisements, social media platforms, and e-commerce websites. And it the visual design that consumers encounter while walking on the street observing peers using the product—a powerful factor in purchase decisions. Thus, when a consumer encounters a product, the consumer identifies the look of the product with the underlying functional features and the visual design comes to represent the features, functions, and total user experience of the product. In this way, "[c]onsumer preferences and motivation are far less influenced by the functional attributes of products and services than the subconscious sensory

and emotional elements" that are encompassed by the design and "derived by the total experience." Smith & Wheeler, *supra*, at 56 (citation omitted); *see also Crilly*, *supra*, at § 6.4, p. 565 ("[T]he symbolic meaning associated with products often has the potential to dominate the aesthetic and semantic aspects of cognitive response.").

This is especially true in the market for complex technological products. As products have become vastly more complex, consumers have limited understanding of every underlying function and feature. Instead, they rely on the visual design of the product to define its category membership and underlying functionality. Thus, counterintuitively, when a single product performs many complex functions, and when functionality is generally equivalent across manufacturers, design becomes more important, not less. Cognitive scientists have established that "as product quality parity has become the norm," design is a key method for manufacturers to "differentiat[e] their goods." Townsend & Sood, *supra*, at 207. In other words, when consumers are cognitively overloaded with multiple functions and choices, and particularly where those functions are perceived as undifferentiated across products, "aesthetics [is] weighted *more* heavily in the choice decision," and consumers are "more likely to select the better looking option, even when there [is] a price premium." *Id.* at 211, 213 (emphasis added).

By stealing designs, therefore, manufacturers steal not only the visual design of the product, but also the underlying attributes attached to the design

of the product and embodied in the mind of the consumer by the product's visual appearance. When a manufacturer copies the design of a successful product, it captures the consumer's understanding of what the product does and what the product means.

Moreover, copying of a design also allows the copier to enter the marketplace on the back of the brand attributes built by the patent holder—who has expended vast sums and effort in design, development, quality standards, marketing, sales and product promotion. Immensely successful companies use visual design to build their brands, expending time and resources to implement "systematic planning of a consistent aesthetic style that is carried through in everything the company does." Schmitt, *supra*, at 13. Strong design can "enhanc[e] emotional contact with ... customers" and "create positive overall customer impressions that depict the multifaceted personality of the company or brand." *Id.* Consumers come to associate particular designs with specific attributes of companies and products. *Id.* at 11-15. Design patent infringement therefore steals much more than the design itself—it robs innovative companies of the entire positive mental model that consumers have created for their brand.

III. Section 289 Requires Disgorgement Of An Infringer's Total Profits On The Infringing Article Of Manufacture.

A. Section 289 requires disgorgement of "total profits" because it is the infringing design that sells the product and makes it possible to realize profits.

Congress has provided that "[w]hoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor." 35 U.S.C. § 171. As Congress correctly recognized, "it is the design that sells" the product and "makes it possible to realize any profit at all." H.R. Rep. No. 1966 (1886), *reprinted in* 18 Cong. Rec. 834 (1887). As demonstrated above, visual design drives sales and comes to represent the product itself in the mind of the consumer. Those who copy patented designs understand this better than anyone. That is why they copy patented designs: to confuse the potential purchaser into buying the copycat product, and to coopt the successful brand of the patent holder. For example, in *K-TEC, Inc. v. Vita-Mix Corp.*, the infringing party started with the patented design and made only "a trivial change," so that "its customers would not be able to distinguish [it] from the [patented] container." 696 F.3d 1364, 1378 (Fed. Cir. 2012).

Congress explained that design patent holders are "entitled to all the good will the design has in the market," and are therefore "entitled to all the profit the infringer made on the goods." 18 Cong. Rec. 834. Section 289 therefore "prevents the infringer from ...

profiting by his infringement." *Id.* It provides that anyone who "during the term of a patent for a design ... (1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied *shall be liable to the owner to the extent of his total profit.*" 35 U.S.C. § 289 (emphasis added).

Section 289's total profits remedy perfectly mirrors the test for design patent infringement settled 145 years ago in *Gorham Co. v. White*. As this Court explained in *Gorham*, "giving certain new and original appearances to a manufactured article may enhance its salable value [and] may enlarge the demand for it," 81 U.S. at 525. If people who go to purchase "articles of manufacture" "are misled, and *induced to purchase what is not the article they supposed it to be*" because of the deceptive design, "the patentees are injured, and that advantage of a market which the patent was granted to secure is destroyed." *Id.* at 528 (emphasis added). The *Gorham* test for design patent infringement thus incorporates the possibility of a captured sale. "[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, *inducing him to purchase one supposing it to be the other*, the first one patented is infringed by the other." *Gorham*, 81 U.S. at 528 (emphasis added); *see also Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1335 (Fed. Cir. 2015) (citation omitted) (A design patent is infringed "[i]f, in the eye of an ordinary observer, giving such attention as a purchaser usually

gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.").

B. Given the jury's infringement finding, Samsung must disgorge its total profits.

This case perfectly illustrates how visual design drives sales and thus why disgorgement of total profits makes sense. Apple's design philosophy encompassed "everything from hardware, software, advertising, communication, and user experience design." Barry M. Katz, *Make It New: A History of Silicon Valley Design* 71 (2015). It required careful consideration of "the aesthetic statement of the enclosure; the software interface ... in short, the emotional valence of the entire product in all its details." *Id.* at 69.

The best example is the iPhone. Without question, the success of the iPhone is due to its merger of industrial design (i.e., the physical appearance of the hardware) and interaction design (i.e., ease of use and GUIs). Apple's entry into the cell phone market sprang from Steve Jobs' observation that "even though [cell phones] do all kinds of stuff—calling, text messaging, Web browsing, contact management, music playback, photos and video—they do it very badly, by forcing you to press lots of tiny buttons and navigate diverse heterogeneous interfaces and squint at a tiny screen." Lev Grossman, *The Apple of Your Ear*, Time, Jan. 12 2007. From the beginning, therefore, iPhone development focused on improving the user

experience through industrial design, not introducing new functions.

The iPhone embodies Jobs' belief that "[d]esign is ... not just what [the product] looks like and feels like. Design is *how* it works." Rob Walker, *The Guts of a New Machine*, N.Y. Times, Nov. 30, 2003 (emphasis added). And the proof, as always, is in the numbers. In the 48 hours following the iPhone's release, Apple sold 270,000 phones. Fred Vogelstein, *Dogfight: How Apple and Google Went to War and Started a Revolution* 77 (2013). "Strangers would accost you in places and ask if they could touch it—as if you had just bought the most beautiful sports car in the world." *Id.* at 80. In just one year, Apple's stock price doubled. *Id.* The iPhone has become a "cultural icon" that "alone generates more revenue for Apple than the entire Microsoft Corporation does." *Id.* at 71.

The iPhone confirms that in the market for complex technology, "attention to a product's appearance promises the manufacturer one of the highest returns on investment," especially given that basic "functionality and performance of products are often taken for granted." Crilly, *supra*, § 9.1, p. 574 (citation omitted). The iPhone did not fundamentally alter the core functionality of the smartphone. Instead, it created a new and vastly simpler and more attractive means of accessing underlying functions based on the application of design principles and practices. The iPhone, after all, "[did]n't even have that many new features—it's not like Jobs invented voice mail, or text messaging, or conference calling or mobile Web browsing." Grossman, *supra*. To the contrary, today's consumers assume that mobile devices will handle voice calls, text

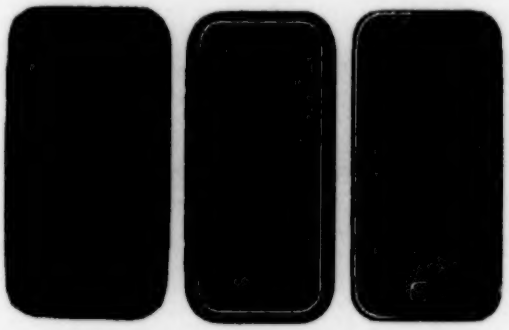
messages, emails, photographs, web browsing, music cataloguing, calendar, databases, and millions of customized applications. But none of these features defines the phone in the mind or eye of the consumer. Instead, it is the visual design of the phone that comes to represent the underlying features. Without the design, the iPhone is simply a pile of electronic components and a few million lines of software code.

In this case, the jury found that Samsung intentionally copied Apple's patents covering the iPhone's front face (U.S. Design Patent No. 618,677), distinctive appearance (U.S. Design Patent No. 593,087), and graphical user interface (U.S. Design Patent No. 604,305). C.A. 640. Indeed, Samsung's infringement covered the most important design elements of the iPhone. The rectangular face with rounded corners, and the home screen with colorful icons, are the most viewed aspects of the device in print and television advertisements, media coverage, and e-commerce websites. In scientific terms, they are the "canonical view" of the phone—that is, the "ideal viewing perspective for optimal recognition." James T Enns, *The Thinking Eye, The Seeing Brain* 205 (2004).

The jury was correctly instructed that it could only find infringement if it found that "in the eye of an ordinary observer, giving such attention as a purchaser usually gives, the resemblance between the two designs is such as to deceive such an observer, *inducing him to purchase [the Samsung phone] supposing it to be [Apple's patented designs].*" C.A. 1394 (emphasis added). Thus, despite Samsung's declaration that the patents it copied do not cover "the iconic look and feel" of the iPhone and instead cover only

"narrow" "partial features of a smartphone's design," Samsung Br. 6 (internal quotation marks omitted), the jury obviously disagreed.

Similarly, Samsung asserts that "[b]efore Apple's iPhone ever entered the market, Samsung had developed mockups and prototypes for round-cornered rectangular flat-screened smartphones," and includes the following images:



Samsung Br. 5. But Samsung conveniently deletes the images that show that its mockups were actually for old-fashioned designs with slide-out keyboards.

JA 248-56, 260, 264-66, 523. Not surprisingly, after copying Apple's designs, Samsung's smartphone market share rocketed "abrupt[ly] upward," C.A.42050-52—jumping from 5% to 20% in just two years, C.A.90104. That is exactly what Samsung was going for. It is therefore appropriate that Samsung disgorge the entire profit it earned from its infringement.

C. Samsung's arguments to the contrary rest on a fundamental misunderstanding of design patents.

1. Samsung argues that this Court should ignore the plain language of § 289, requiring disgorgement of an infringer's total profits, and should adopt a tortured interpretation of the words "article of manufacture," because "[u]nder the Federal Circuit's rule, an infringer of a patented cupholder design must pay its entire profits on a car, an infringer of a patented marine-windshield design must pay its entire profits on a boat, an infringer of a patented, preinstalled musical-note icon design must pay its entire profits on a computer, and so on." Samsung Br. 1, 30-31.

But Samsung's "disastrous practical consequences," Samsung Br. 2, ignore the actual test for design patent infringement. Under the actual test, one who patents a design for a cupholder could never recover profits on an entire car because no one could ever be induced into purchasing a Jeep supposing it to be a Porsche simply because the two have cupholders that look the same. Similarly, no one could ever be induced into purchasing (1) a dinghy supposing it to be a yacht because of the design of the windshield; (2)

a Samsung ChromeBook supposing it to be a MacBook because one musical-note icon looks the same; (3) a Dr. Seuss book believing it to be Shakespeare because of the bookbinding design; (4) a Kenmore refrigerator believing it to be a Sub-Zero because of the refrigerator latch casing, or, finally, (5) any "electronic device" believing it to be an iPhone because of one circular button. Samsung Br. 1, 33, 45-48; U.S. Br. 20-21, 23-24. Samsung's examples go on and on, but none acknowledge that the test for design patent infringement incorporates the possibility of a captured sale.

In order to prove design patent infringement, the owner of a design patent for a cupholder (of which there are a total of 26, *see* http://tinyurl.com/hxkjc9m) would have to show that the allegedly infringing cupholder was sufficiently similar such as to possibly induce Jeep or Porsche to purchase the infringing cupholder for use in its vehicles supposing it to be the patented cupholder design. If the patent owner proved as much, he could then recover the total profits that the infringer earned from selling the copycat cupholders to Jeep or Porsche. *See, e.g., Ethicon Endo-Surgery*, 796 F.3d at 1335.

2. Samsung also asks this Court to ignore the plain language of § 289 because Congress was only concerned with design patents for "carpets, wallpapers, and oil-cloths," and never suggested that "it is the design that sells the article ... for complex products like smartphones." Samsung Br. 2, 14, 25, 40, 41. But this reflects, if anything, the state of industrial design in 1887, not any Congressional judgment that

design patents should not apply to complex technological products. As earlier noted, it is only since the early 20th century that industrial design's influence in the United States has been felt in mass produced consumer goods "in the areas of machinery, appliances, and vehicles." *Supra*, at 7-9; Pulos, *supra*, at 324. In 1887, design was "an indispensable ingredient in the success of domestic furnishings" and generally focused on "cultural products such as pianos, melodeons, and seraphines for music in the home and printing and daguerreotype processes for visual gratification." *Id.* at 133. Yet despite the dramatic increase in the importance of industrial design and Congress's many amendments to the Patent Act since 1887, including eliminating the infringer's total profits as a remedy for utility patent infringement in 1946, *see* Act of Aug. 1, 1946, Ch. 726, 60 Stat. 778, Congress has continually maintained the total profits remedy for design patent infringement and expressly reaffirmed it with the adoption of § 289 in 1952.

3. Samsung's insistence that § 289's total profit rule "would encourage companies to divert research and development from useful technologies to ornamental designs" is false. Samsung Br. 2. As earlier noted, *supra* 30-31, under the current rule for design patent infringement, one could never recover the profits earned from an entire product simply because the product infringed "the most trivial design patent."

Instead, it is weakening § 289 as Samsung urges that would dramatically diminish the value of design and dramatically weaken the United States' competitive position in the world. Design protection "has wide international buy-in." David J. Kappos, *America*

Doesn't Do Enough to Protect Its Innovative Designs, Wired (Nov. 9, 2015), http://tinyurl.com/q5nqspk. If anything, the total profits remedy is weak compared to the remedies for design theft available around the world.

In England, copying a registered design is a criminal offense and infringers face money damages or an account of their profits as an alternative equitable remedy. David Charles Musker, *Industrial Design Rights: United Kingdom, in* Industrial Design Rights: An International Perspective at § 20.05[D], 372-73 (Brian W. Gray & Rita Gao eds., 2d ed. 2016). Design patent infringers in France face not only total profit damages, but also damages reflecting the cost savings of promotional investments resulting from the pirated design, prison sentences of up to three years, and temporary or permanent closure of their business. Alexandra Neri, *Industrial Design Rights: France, in* Industrial Design Rights, *supra* at § 7.05[D], 129-31. Similarly, in Italy design patent infringers face permanent injunctions, attachment and destruction of the counterfeited goods, and criminal sanctions, in addition to money damages. Luigi Pavenello, *Industrial Design Rights: Italy, in* Industrial Design Rights, *supra*, at § 10.05, 191-92.

Thus, to maintain "America's lead" in the field of industrial design, "it is critical that we continue to incentivize investment in great design by ensuring that our design protection laws remain strong," and by rejecting "proposals that seek to drastically alter design protections—including serious consequences for infringement." Kappos, *supra*.

D. This Court should decline to adopt the "totality of the circumstances" test for identifying an article of manufacture.

The United States agrees that § 289 "authorizes a patent owner to recover an infringer's total profit from an infringing article of manufacture." U.S. Br. 10. It also agrees that § 289 "does not permit apportionment based on the extent to which the infringer's profit on the relevant 'article of manufacture' was attributable to the infringing design." *Id.* at 11. However, it suggests a multi-factored, indeterminate "totality of the circumstances" "case specific analysis" for identifying the relevant article of manufacture. *Id.* at 25.

According to the United States, in determining the relevant "article of manufacture," the jury should consider the scope of the claimed design, the extent to which the design determines the appearance of the product as a whole, the existence of unrelated elements of the product, the extent to which various components can be physically separated from the product as a whole, and the manner in which the components were manufactured. *Id.* at 27-30. The United States offers no guidance on how these "considerations" should be weighed, but it implies that a design for a Volkswagen Beetle might not apply to the car as a whole, but only to the "appearance of the automobile's body." *Id.* at 26. Therefore, if a car company were to intentionally copy the patented design for the Volkswagen Beetle (*see* U.S. Design Patent No. D729,697 (May 19, 2015)) down to the very last detail, and a reasonable observer could buy the counterfeit car believing it to be a Beetle, Volkswagen would be

entitled only to the profits that the counterfeiter earned on the car's outer body shell, not on the car itself.

If anything, the VW example confirms the sense of the total profits rule. Volkswagen "consistently uses design to build a cult-like customer culture," which it protects through design patents. Butler, *supra*, at 208. And today, design "outranks all other considerations as the prime motivator of most new-car purchase decisions." Lamm, *supra*, at 8. "Reliability, braking, steering, handling, ride, and refinement are all largely on par across automakers and segments." Bob Lutz, *Go Lutz Yourself: There Are No Bad Cars, Only Bad Designs*, Road & Track (Aug. 13, 2015), http://tinyurl.com/zgbqz9h. Indeed, "[t]he days of seeing a comparison test of four cars where one is the obvious loser are gone, replaced by a new age of automotive equality." *Id.* In today's world, there is "just one chief differentiator" when it comes to cars: design. *Id.* Therefore, one who copies a car's design should disgorge all profits.

In any case, it is not the role of the jury to engage in amorphous and indeterminate balancing tests that have no basis in the statutory text. Pursuant to § 289, it is the role of the jury to decide whether "in the eye of an ordinary observer, giving such attention as a purchaser usually gives, the resemblance between the two designs is such as to deceive such an observer, inducing him to purchase one supposing it to be the other," and, if so, to award the total profits the copier earned from his infringement. That is exactly what the jury did here. The Court should affirm.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Date August 4, 2016

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74. Patricia Moore, Ph.D
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